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MONTANA PROSECUTOR

JULY/AUGUST, 1980 Vol. 4, No. 4

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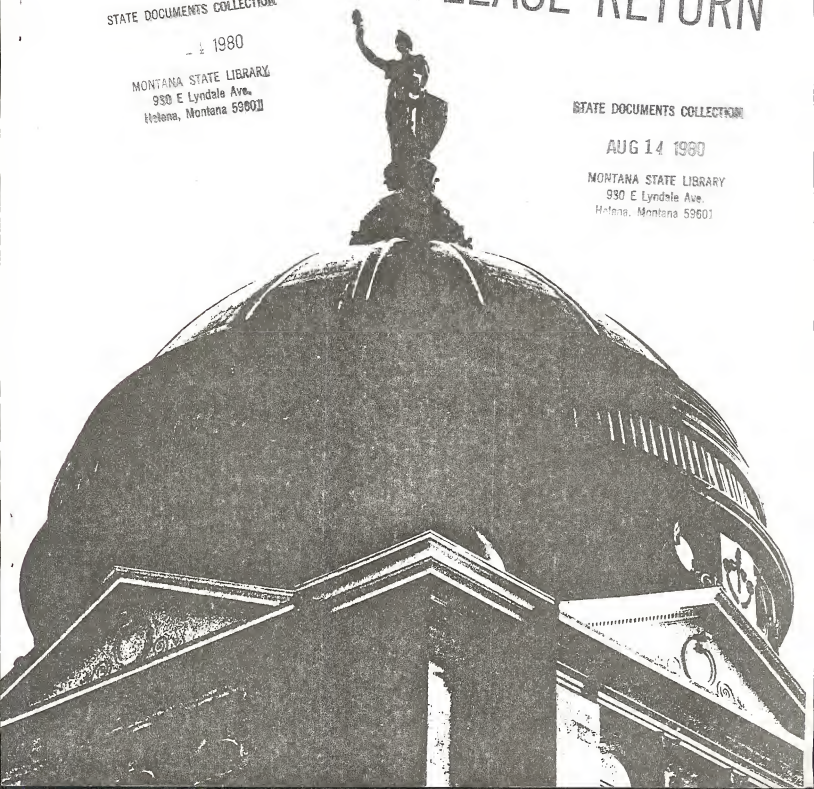

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INTRODUCTORY NOTES

At the Montana County Attorneys convention at Fairmont Hot Springs from July 16, 1980 to July 19, 1980 the following persons assumed the offices listed as a result of election:

President: Richard P. Heinz - Lake County
First Vice-President: Robert Brooks - Powder River County
Second Vice-President: Keith Haker - Custer County
Third Vice-President: Don White - Gallatin County
Secretary: James E. Seykora - Big Horn County
Treasurer: John L. Pratt - Musselshell County

Directors

John T. Flynn - Broadwater County
Allin Cheetham - Chouteau County
William A. Spoja - Fergus County
Charles A. Graveley - Lewis and Clark County
Robert L. Deschamps, III - Missoula County - NDAA Representative
Conrad Fredricks - Sweet Grass County

The following committee appointments were also made:

Legislative Committee

Charles Graveley
Robert L. Deschamps, III
Don White
Ted Lympus

Indian Jurisdiction Committee

Richard Heinz
Jim McCann
Ron Smith
Don Ranstrom
Jim Seykora

Site Committee

Bob Brooks
Conrad Fredricks
John Pratt

Training Committee

Duke Gilbert
Charles Graveley
Bill Spoja

Special Gambling Committee

Keith Haker
Harold Hanser
Fred Bourdeau

The tentative dates for next year's convention are July 22,23,24 and 25, 1981. The site has not yet been firmly established.

Two fall meetings are scheduled for county attorneys and their deputies. First of all, on October 6, 1980 at the Yogo Inn in Lewistown a meeting will be held to review legislative matters presently being considered by the Legislative Committee. Secondly, on December 11 and 12, 1980 at the Ramada Inn in Billings a final legislative review and training seminar will be presented. The training seminar

is entitled "Search and Seizure" and will be conducted by Charles E. Moylan, Jr., Associate Judge of the Maryland Court of Special Appeals. More information concerning specific schedules will be forthcoming.

Included with this issue is an article dealing with the polygraph techniques and correspondence concerning transfer of federal prisoners to state custody upon completion of their federal sentences.

RECENT CASES AND NOTES

APPEAL - DOUBLE JEOPARDY

Filing additional criminal charges resulting from the same episode, after defendant successfully challenged his conviction on the original charges, is prohibited by principles of fairness derived from the double jeopardy clause. State v. Martin (Or.) 607 P.2d 171.

ARREST

If there are reasonable grounds for a valid warrantless arrest, the arrest will not be invalidated merely because the officer gave the wrong reason for the arrest. State v. Luna (N.M.) 606 P.2d 183.

ARREST - EXIGENT CIRCUMSTANCES

Where the arresting officers knew defendant was armed, had participated in violent crimes including murder, had been upset from lack of drugs and was planning to move elsewhere, they were justified in making a warrantless arrest of defendant. The fact the arrest was delayed for 1 1/2 hours while the officers attempted to call defendant, discussed evacuating the trailer park defendant was in and methods of making a safe arrest merely "underscored the danger involved," and did not constitute proof that there were no exigent circumstances. People v. Caldwell (Cal.App.) 162 Cal.Rptr. 397.

CHAIN OF CUSTODY

The chain of custody rule may be relaxed when physical evidence is positively identified at trial and there is testimony the object remains unaltered. Stolen tires and an adding machine tape from the burglarized building, found crumpled up inside one of the tires, were relevant and properly admitted. State v. Hayden (Kan.App.) 606 P.2d 115.

DRUGS AND NARCOTICS

Where the defendant tried unsuccessfully to locate a container of heroin which his friend had concealed for a government informer, he could be found guilty of aiding and abetting the distribution of heroin (the transaction was completed the next day). The defendant's unsuccessful search was an effort to keep the transaction alive, and therefore constituted aiding and abetting, instead of a mere attempt. United States v. Pino (4th Cir.) 608 F.2d 1001.

FELONY MURDER - HOSTAGES

Where the police accidentally killed a hostage while trying to arrest the defendants, the defendants could be convicted of felony murder. Jackson v. State (Md.) 408 A.2d 711.

IDENTIFICATION - CORPUS DELECTI

Evidence that a car passed recklessly on a wet curve, resulting in a (fatal) crash sufficiently proved the corpus delecti of driving in a careless manner; defendant's statement at the scene that he was the driver of that car did not need to be corroborated before it could be admitted. Evidently identity is not part of the corpus delicti and can be established solely by defendant's admission, unless the crime "is inseparably bound up with the identity of the accused; for example, in tax evasion cases." United States v. Leavitt (9th Cir.) 608 F.2d 1290.

INSANITY - WITNESSES

Where the defendant raised the defense of insanity, a police officer could testify that when the defendant was present at the murder scene he "seemed to be fit of mind" and not "suffering from any kind of illness." State v. Conn. (Md.) 408 A.2d 700.

INSTRUCTIONS - INSANITY

The fact that defendant may have been reckless or negligent in discontinuing medication to prevent him from lapsing into a psychotic state did not alter the fact that beating the victim to death with a rifle barrel was an intentional act. Therefore, defendant's requested instructions on reckless manslaughter and criminally negligent homicide were properly rejected. State v. Davis (Or.App.) 606 P.2d 671.

JURISDICTION - CONDITION

Whether or not appellant was unlawfully extradited does not effect the validity of his conviction. Bell v. Bower (Colo.) 606 P.2d 74.

POLICE REPORTS - IMPEACHMENT

Where the defense had used the agent's notes extensively, quoting from them and possibly leaving a confusing or misleading impression, the doctrine of completeness as evidenced by Rule 106 justified admission of the notes. United States v. Rubin (2nd Cir.) 609 F.2d 51.

VEHICULAR HOMICIDE - LESSER INCLUDED OFFENSES

An acquittal of DWI and a conviction for reckless driving in a municipal court barred a subsequent vehicular homicide case in which the underlying acts were the lesser included offense. State v. James (N.M.App.) 606 P.2d 1101.

PROSECUTORS

The presence of three prosecutors at trial was not inappropriate where only one prosecutor handled the trial and questioned the witnesses, and defendant's counsel was competent and not overwhelmed by additional prosecutors. People v. Foster (Ill.App.) 400 N.E.2d 462.

RAPE - SEXUAL ASSAULT

Excluding cross-examination about whether the victim had been sleeping with her boyfriend and whether she was a prostitute was proper here. "It is not the province of the jury to pass moral judgement on the victim, and the court should remove the temptation to do so wherever possible." State v. Romero (N.M.App.) 606 P.2d 1116.

SEARCH AND SEIZURE

Observation of a heroin transaction by a police surveillance team through a restaurant window was not a search since the transaction occurred in "plain view" and the defendant had no "reasonable expectation of privacy" in activities occurring in a public place. Hamilton v. State (Tex.Cr.App.) 590 S.W.2d 503.

VOLUNTARINESS OF STATEMENT - PROMISES

A statement that it would be better if defendant told the truth was not a promise, not likely to induce a false confession and was not grounds for suppressing the subsequent confession. State v. Tillery (Kan.) 606 P.2d 1031.

FORFEITURE - PLEA AGREEMENTS

Where the plea agreement was silent about forfeiture proceedings, the state could not forfeit defendant's vehicle, since forfeiture is a form of punishment. Matter of 1972 Chevrolet Corvette, Etc. (Ariz.) 606 P.2d 11.

AGGRAVATED ASSAULT - POLICE OFFICERS

Where a local police chief had requested the assistance of a Bureau of Indian Affairs officer in making an arrest off the reservation, the BIA agent was a "law enforcement officer" for the purpose of the South Dakota aggravated assault statute. State v. Winchler (S.D.) 286 N.W.2d 313.

CHAIN OF CUSTODY - KNIFE

Chain of custody is unnecessary for the admission of a nonfungible item , here a knife used in an assault, which can be identified upon mere observation. March v. State (Ga.App.) 260 S.E.2d 761.

COUNSEL - ARGUMENT

The court did not abuse its discretion by refusing to allow the defendant, who was represented by counsel, to personally make a closing argument to the jury. Wilson v. State (Md.Sp.App.) 408 A.2d 1058.

DISCOVERY - STATEMENTS

Where the defense requested the prior statements of a prosecution witness and the prosecutor stated that he had turned over all statements, the defense was not entitled to personally inspect the prosecutor's file to see if any other statements were present. People v. Poole (N.Y.) 397 N.E.2d 697.

FELONY MURDER - INSTRUCTIONS

"It is permissible to instruct regarding felony-murder even though felony-murder is not pleaded. (Citations omitted) It is not necessary to allege that murder was commited in the perpetration of another crime in order to introduce evidence of such other crimes. (Citation omitted)" (Footnote) Turner v. State (Nev.) 605 P.2d 1140.

IMPLIED CONSENT - DWI

Not allowing defendant to contact her attorney before she had to choose whether or not to take a breath test meant that the breath test results would be suppressed. State v. Scharf (Or.) 605 P.2d 690.

INSTRUCTION - JURY

The court properly refused to give an instruction forbidding the jurors to communicate the contents of their notes to each other. State v. Post (Iowa) 286 N.W.2d 195.

INSTRUCTIONS - VOLUNTARINESS OF STATEMENTS

It is unnecessary to instruct the jury that the state must prove the voluntariness of defendant's statements beyond a reasonable doubt in the Ninth Circuit. United State v. Johnson (9th Cir.) 608 F.2d 725.

JURY

Forgetting to swear in the jury until after the first witness had completed her testimony was not reversible error. People v. Hollis (Colo.App.) 605 P.2d 483.

PRIOR CONVICTIONS

A nine-year old misdemeanor marijuana conviction was not admissible under Rule 609. Assuming defendant's character was placed in evidence, making the conviction relevant under Rule 404 (b), the probative value was outweighed by the prejudice and it should have been excluded under Rule 403. Combined with several other errors the aggregate amounted to reversible error. United States v. McLister (9th Cir.) 608 F.2d 785.

PRIOR BAD ACTS - DRUGS AND NARCOTICS

Where the defendant claimed that he lacked the requisite intent necessary to convict him of selling narcotics, a government informant could testify that he had sold heroin for the defendant on earlier occasions. Hicks v. State (Ind.) 397 N.E.2d 973.

SEARCH AND SEIZURE - MILITARY

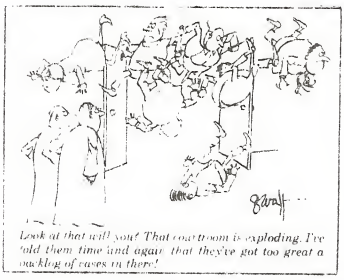
Where the defendant's girlfriend, who had access to and use of the defendant's bedroom and closet, consented to a search of his apartment, the police could conduct a warrantless search despite the fact that the defendant was present and refused to consent to the search. People v. Cosme (N.Y.) 397 N.E.2d 819.

VALUE

Uncontradicted testimony from a local expert that a ring was worth between $1,250 and $1,400 was sufficient to sustain defendant's conviction for stealing something worth more than $1,000, even though the victim and defendant had discussed selling the ring for less than $1,000. State v. Borlick (Utah) 605 P.2d 761.

VALUE - THEFT

The jury was properly allowed to aggregate the value of all the stolen property defendant was charged with possessing to determine the degree of the theft. A person is exercising control over all property in his possession, "and the total value of that property should be used to determine the degree of guilt". State v. Post (Iowa) 286 N.W.2d 195.



Look at that will you! That courtroom is exploding. I've told them time and again that they've got too great a backlog of cases in there!

PROSECUTION ARGUMENT - GRIFFIN COMMENTS - GESTURES

Where the prosecutor gestured toward the defendant after commenting in final argument on what other witnesses could have testified to, this was an impermissible comment on the defendant's failure to testify in his own behalf. The error was not harmless where the evidence of guilt was far from overwhelming, there were other substantial errors at trial, and the trial judge did not give any instruction explaining the defendant's right not to testify or admonish the jury to disregard the prosecutor's comments. Eberhardt v. Bordenkircher, 605 F.2d 275, 6th Cir., 1979.

ARREST - WHAT CONSTITUTES - INVITATION TO SIT IN REAR OF PATROL CAR

Where police officers asked a person to step outside of a store and "invited" him to sit in the rear seat of a patrol car, which had no inside handles or latches and could not be opened from the back seat, the person was in custody and had been "seized" for Fourth Amendment purposes, notwithstanding testimony by the police officers that they did not consider him to be under arrest or restraint and that he could have walked off if he wanted to. Hughes v. State, 588 S.W.2d 296, Tenn., 1979.

ARREST - PROBABLE CAUSE - NCIC PRINT OUT AND FBI WANTED FLYER

"It is clear that Officer Robinson had probable cause to arrest appellant under Florida law, so long as the officer reasonably believed that appellant was the subject of a federal arrest warrant...While NCIC printouts are not alone sufficient evidence to permit conviction, the cases uniformly recognize that NCIC printouts are reliable enough to form the basis of the reasonable belief which is needed to establish probable cause for arrest...Furthermore, there was unimpeached testimony at appellant's trial establishing that NCIC information has proved reliable in the past as an indicator [of] who in fact is wanted as a fugitive. Having seen both a recent NCIC printout and a FBI wanted flyer on [defendant], Officer Robinson clearly had probable cause to effect the arrest in this case." United States v. McDonald, 606 F. Rptr. 552, 5th Cir., 1979.

SEARCH - WHAT CONSTITUTES - BEEPERS

The Court of Appeals of North Carolina joins other courts in holding that the installation and monitoring of a "beeper" device in or on a motor vehicle, as well as installation in a canister containing a lawful substance, and the radiotracking and monitoring activity incident thereto, constituted a "search" for Fourth Amendment purposes. The Court cites cases from several jurisdictions on the use of such devices. It laid down guidelines for the issuance of search warrants and orders for the use of such devices. State v. Hendricks, 258 S.E.2d 872, N.C.App.,1979.

SEARCH INCIDENT TO ARREST - TRAFFIC VIOLATION - INCREMENTAL SEARCH

Where defendant's automobile was stopped for a traffic violation, and the police officer observed a television set in the back seat with a number on the top, raising a suspicion that it had been stolen from a motel, and the defendant inadvertently pulled a motel room key out of his pocket while getting out his identification, the officer was justified in asking defendant to hand him the key. The officer then ascertained that the key was to room 145 of a Travel Lodge Motel, and a telephone call to the motel verified that the television set from room 145 was missing. "The stop was justified for a traffic violation; the request for passenger identification was justified by the presence in plain view of a numbered television set which the officer associated, with founded suspicion, with a motel; and the appearance of a motel room key in [defendant's] possession further reinforced that suspicion and justified the further limited intrusion represented by the officer's request for possession and closer inspection. To the extent that the episode constituted an incremental search, it was reasonable by Fourth Amendment standards." Wilkerson v. State, 376 So.2d 63, Fla.App., 1979.

WARNING OF RIGHT TO FREE COUNSEL - NON-INDIGENTS

"...Defendant was not advised that counsel would be furnished to him before any questioning for the purpose of having counsel present at such questioning. This omission was not fatal. Defendant was not an indigent, as witnessed by his employment of counsel. The purpose of advising a defendant of his right to have counsel appointed prior to questioning if the defendant cannot afford counsel is to protect the indigent. The defendant did not require this protection." State v. Woodward, 587 S.W.2d 287, Mo.App., 1979.

DISORDERLY CONDUCT - OBSTRUCTING A POLICE OFFICER - REFUSAL TO PROVIDE BOOKING INFORMATION TO POLICE

It has been held that a defendant's refusal to provide booking information to a police officer after an arrest does not constitute the crime of obstructing a police officer. "It is undisputed that once one is placed under arrest he has the right to remain silent and that voluntary statements made by him are admissible in court...It would be incongruent to say that one may remain silent and yet must provide 'booking' information. It is not a crime for an accused to maintain an antagonistic and belligerent attitude." One dissenting judge pointed out that "I visualize real and concrete problems with the efficient administration of justice if we become faced with a general practice or rule rather than an exception of individuals under arrest refusing to answer valid and proper questions of law enforcment officials." People v. Weathington, 394 N.E.2d 1059, Ill.App., 1979.

APPEAL - TRAFFIC VIOLATIONS

Where the defendant filed his notice of appeal in a DWI case after the jury verdict but before sentencing, his actions were premature, and the appellate court lacked jurisdiction to hear the appeal. State v. Long (Neb.) 286 N.W.2d 772.

ARGUMENT

Argument that defendant had changed stories after the realities of the situation forced a change was not improper. State v. Link (Minn.) 289 N.W.2d 102.

ARREST - TRAFFIC VIOLATIONS

Oregon upholds running a routine radio check on the licence of a person stopped for a traffic violation in a case where the officer may have actually stopped the vehicle because he suspected the occupants had just committed a robbery. A radio call reporting the robbery and describing defendant and the vehicle, which came in during the license check procedure, constituted probable cause for a valid arrest. State v. Zimmerlee (Or.App.) 607 P.2d 782.

BURGLARY

Where the defendant drove up to the drive-in window of a bank and took money from a coconspirator inside of the building, there was sufficient entry to support a conviction under a federal statute prohibiting entry into a bank with intent to commit theft. United States v. Phillips (8th Cir.) 609 F.2d 1271.

CONVICTION - IMPEACHMENT

A jury verdict of guilty, prior to the formal entry of judgement and sentencing, may be used as a conviction for impeachment purpose under Rule 609(a). United States v. Vanderbosch (2nd Cir.) 610 F.2d 95.

CROSS-EXAMINATION - RELEVANCE

The court did not abuse its discretion by refusing to allow defense counsel to cross-examine the complaining witness on his refusal to talk to a defense investigator. The refusal was not relevant to any issue in the case. Mitchell v. United States (D.C.App.) 408 A.2d 1213.

DOUBLE JEOPARDY - GUILTY PLEA

Where the defendant's guilty plea pursuant to a plea agreement was reversed on appeal, prosecuting defendant on charges that had been dismissed as a part of the plea agreement was not barred by double jeopardy. Hawk v. Berkemer (6th Cir.) 610 F.2d 445.

EVIDENCE - AMENDMENTS

Amending the charge from attempted destruction of evidence to attempted concealment of evidence was not error where the basis of the charge, throwing a marijuana pipe away as the police approached, remained the same and defendant was unable to show how he was surprised or his trial strategy was changed. McGahan v. State (Alaska) 606 P.2d 396.

FELONY-MURDER - HOMICIDE

It is unnecessary to amend an indictment to allege felony-murder as long as first degree murder, with premeditation, malice aforethought, and deliberation is charged. State v. Foy (Kan.) 607 P.2d 481.

GUILTY PLEA

After defendant managed to get his guilty plea vacated on appeal, the prosecution did not have to stick to its side of the plea bargain and could file additional charges. United States v. Black (9th Cir.) 609 F.2d 1330.

HEARSAY - BUSINESS RECORDS

Hotel registration forms were properly admitted under Rule 803(6) even though the evidence connecting defendant to the records was circumstantial and even though the employees who identified the records did not work at the hotel at the time the records were made. The circumstantial evidence showed that defendant had called and attended meetings at the hotel on the dates in question, the names used were names defendant used, and the address on the registration form was the address on defendant's business card. United States v. Smith (9th Cir.) 609 F.2d 1294.

HEARSAY - COCONSPIRATOR'S STATEMENTS

An acquittal during the first trial on the conspiracy counts did not prevent the prosecution from introducing coconspirator's statements during the subsequent trial for the substantive offenses of importing heroin. United States v. Clark (2nd Cir.) 613 F.2d 391.

IDENTIFICATION

Every accidental confrontation between an indentification witness and the defendant should be scrutinized carefully, to determine if it affected the reliability of the subsequent in-court identification. The police negligently confining the defendant and the identification witness together for an hour meant that the in-court identification lacked sufficient reliability. The case is reversed, since the witness was the only person who claimed to have seen defendant with a gun. Green v. Loggins (9th Cir.) 614 F.2d 219.

HEARSAY - DRUGS AND NARCOTICS

The record of a multi-million dollar marijuana ring, containing notations of deliveries of marijuana to defendant, was properly admitted in defendant's trial. The records constituted a declaration in furtherance of the conspiracy and furnished their own indicia of firsthand knowledge and reliability, since it is reasonable to expect the records of a multi-million dollar business will be kept with care and precision. Further, a handwriting expert said a coconspirator made the records and the records were corroborated by the seizure of a shipment of marijuana (mentioned in the records) to defendant. United States v. McGrath (2nd Cir.) 613 F.2d 361.

INFORMANTS - DRUGS AND NARCOTICS

Even if refusal to disclose the informant is error, the error is harmless where defendant knows the identity of the informant. "The disclosure rule should afford no deliverance to one who possesses information which the police, in keeping faith with their informant, cannot produce." People v. Madrigal (Cal.App.) 161 Cal.Rptr. 209.

INSTRUCTIONS - ALLEN CHARGE

Giving an Allen charge is not error per se in the 9th Circuit. Instead the court looks at the circumstances of each case to determine whether the charge given was inherently coercive. (The opinion states that an instruction, verbatim in opinion, correctly contained all the elements of the charge sanctioned in the original United States Supreme Court case.) United States v. Beattie (9th Cir.) 613 F.2d 762.

INSTRUCTIONS - IMMUNITY

Where the court gave a general instruction on credibility of witnesses which cautioned the jury to consider the bias and interest of any witness, the court did not err by refusing to give a specific instruction regarding the state's principal witness, who testified under a grant of immunity. Linse v. State (Wis.) 286 N.W.2d 554.

JUDGE - BIAS

A judge's complaints that the system was excessively concerned with defendants' rights, etc. was insufficient grounds to disqualify him. Bias and prejudice must be bias and prejudice toward a litigant or favortism toward the other litigant. "Views relating to legal questions, even strongly-held views in favor of law enforcement, do not amount to personal bias." State v. Foy (Kan.) 607 P.2d 481.

JURY

Two black men sitting out in the hall telling the jury that jurors were prejudiced, as the jury filed by, was not grounds for a mistrial even though the defendant in the case was also black. People v. Hunter (Colo.App.) 607 P.2d 1026.

MARITAL PRIVILEGE

On the federal level the decision whether to invoke the marital privilege belongs solely to the witness-spouse; neither the prosecution nor the defendant-spouse can compel the witness-spouse to testify or refuse to testify. Trammel v. United States 100 S.Ct. 906.

MIRANDA - STATEMENT

Where the defendant was questioned by police shortly after be became a suspect but before his arrest, allegations that a police officer told him at the initial questioning that he did not need a lawyer did not affect the admissibility of his subsequent admissions. The defendant was not the subject of a custodial interrogation at the time the advice was given and he was not entitled to any Miranda rights. State v. DeBoid (S.D.) 286 N.W.2d 801.

MIRANDA - TRAFFIC VIOLATIONS

Where the investigating officer suggested that both drivers go to the hospital, then continued the investigation there, defendant's admission that he didn't have insurance was admissible without Miranda, since defendant was not in custody. State v. Greenbert (Kan.App.) 607 P.2d 530.

After defendant gave a false name when he was stopped for an equipment violation and was arrested, asking him his true name during booking did not constitute custodial interrogation and his volunteered statement that he was driving on a suspended license was properly admitted. State v. Cohn (Or.App.) 607 P.2d 729.

PRIOR BAD ACTS - ARGUMENT

In a felon with a firearm trial failure to object or to move to strike hearsay, that a victim was robbed by the defendant, waived the matter on appeal since defendant invited the error by failing to give the court a chance to rule on the testimony he now objects to. Since the testimony was properly part of the record, the prosecutor could comment on it in closing argument. United States v. Mitchell (10th Cir.) 613 F.2d 779.

Evidence of another armed robbery by "robbers wearing ski masks, goggles, and jumpsuits and using a stolen vehicle for a getaway car" could properly have been admitted under the plan exception of Rule 404(b). Therefore the prosecutor referring to the other crimes during opening statement was not error even though the trial court later reversed itself and excluded the other crime evidence. Evidence that defendant possessed a sawed-off shotgun could properly have been admitted under Rule 404 to show opportunity to commit the charged robbery, since he had access to weapons similar to those used in the robbery. United States v. Woods (6th Cir.) 613 F.2d 629.

PROBATION REVOCATION

A probationer is not constitutionally entitled to discovery in revocation proceedings. People v. Dewitt (Ill.) 397 N.E.2d 1385.

RADAR - EVIDENCE

In a case of first impression the Kansas Court of Appeals holds that the court may take judicial notice of the fact that the Doppler effect is an acceptable method of determining speed. The judicial notice; testimony the machine and tuning forks were tested and found to be accurate; and the failure of the defense to present evidence that radar in general, or this set in particular, is defective resulted in defendant's speeding conviction being affirmed. (Good collection of cases) State v. Primm (Kan. App.) 606 P.2d 112.

RAPE

The South Carolina rape shield law, which limits the introduction of evidence of a rape victim's prior sexual conduct, does not violate a defendant's constitutional rights to cross-examine and confront witnesses. State v. McCoy (S.C.) 261 S.E.2d 159.

SEARCH AND SEIZURE

Where the defendant was arrested for disorderly conduct, and amphetamines were found in his pocket during the search incident to the arrest, the failure of the state to file a disorderly conduct charge did not require the suppression of the amphetamines in the possession charge. State v. Harris (N.D.) 286 N.W.2d 468.

SEARCH AND SEIZURE

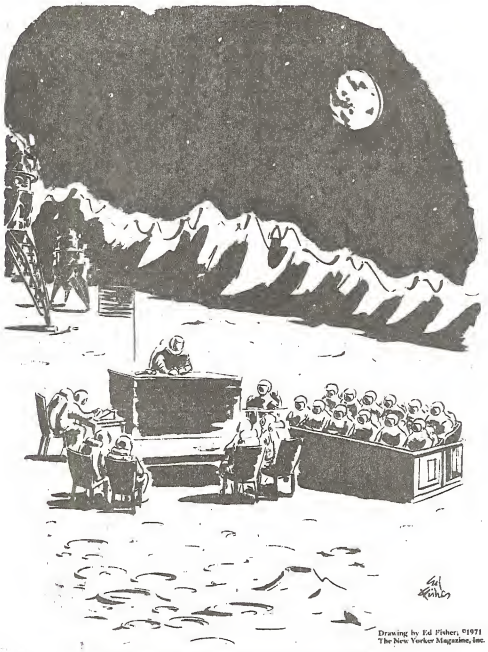
An officer, investigating a complaint of registering under a false name, who smelled marijuana smoke coming from the guest's room had probable cause to make an arrest, and there were exigent circumstances present since if the officer left to get a warrant the marijuana would disappear. Therefore, his statement that defendant could either produce the marijuana or the officer would tear the room apart did not invalidate defendant's consent when defendant voluntarily produced the marijuana. State v. Campbell (Or.App.) 607 P.2d 745.

SEARCH WARRANT

Where the affiant unintentionally fails to sign the affidavit supporting a search warrant, the warrant is not rendered invalid as long as the affiant fulfills all of the statutory requirements necessary for the warrant, is identified in the affidavit, and the magistrate is certain of his identity. State v. Roubion (La.) 378 So.2d 411.

SEARCH WARRANTS

Where neither victim was certain of the caliber of the rifle used to assault them, a search warrant description of a "bolt action rifle, caliber unknown" was sufficient. State v. Williams (Or.App.) 607 P.2d 740.



Drawing by Ed Fisher, ©1971 The New Yorker Magazine, Inc.

"Not another change of venue, Counsellor!"

EXPERT WITNESSES

After a defense psychiatrist testified that appellant was not prone to violence, was overly protective and easily fearful, barring further testimony that the defendant acted solely out of fear and did not engage in reflective thinking prior to the killing was proper under Rule 702. The testimony would have added nothing to the common knowledge and experience of the jury. State v. Dickey (Ariz.) 608 P.2d 302.

FIFTH AMENDMENT - CONFRONTATION

Permitting a witness to invoke the Fifth Amendment on cross-examination does not always require striking all or part of the testimony of the witness; striking all or part of the testimony is necessary when the Fifth is invoked on something which the State asked the witness about on direct examination or when the testimony would "tend to establish untruthfulness" about specific events of the charged crime. Failure to strike was reversible error where, inter alia, some of the questions the witness refused to answer might have connected the witness to the people who defendant alleged actually committed the crime. State v. Dunlap (Ariz.) 608 P.2d 41.

The test for whether allowing a State's witness to invoke the Fifth Amendment violates defendant's Sixth Amendment rights "is whether the defendant's inability to cross-examine created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness' direct testimony." Here refusal to answer about the source of funds in the killing for hire may have prevented the defense from discrediting testimony of the key witness, and failure to strike was reversible error. However, allowing the witness to invoke the Fifth Amendment about other bombings was not error where the questions could have implicated defendant in other crimes. State v. Robison (Ariz.) 608 P.2d 44.

MIRANDA

Brief, uninterrupted questions to find out what happened, who was involved and if a crime had been committed did not amount to custodial interrogation requiring Miranda where the police had received a radio call, "There is one dead and we have three in custody", and the defendant was sitting calmly in his truck when the police arrived. Asking who shot the man, where the gun was, and why the man was shot did not constitute custodial interrogation here, even if probable cause existed to arrest prior to the questions. State v. Dickey (Ariz.) 608 P.2d 302.

AID AND ABET

Upon retrial of all defendants, the conviction of an accessory for first degree murder is upheld even though the codefendant, who the state charged actually committed the killing, was only tried on second degree murder charges. State v. Wilder (Wash.App.) 608 P.2d 270.

AID AND ABET - INSTRUCTIONS

An individual can be convicted for aiding and abetting a possessory crime under the instructions (verbatim in opinion) given in the case. Roland v. State (Nev.) 608 P.2d 500.

BURGLARY - BUILDING

An open carport attached to a house constituted a building, and defendant's conviction for burglarizing it is upheld. In Re Christopher Lee J. (Cal.App.) 162 Cal.Rptr. 147.

COMMENT ON SILENCE

Neither a comment by the prosecutor of defendant's silence at the scene of a shooting when accused by a private party, nor the prosecutor's comment on defendant's failure to claim self-defense when confronted by officers at the scene, constituted a deprivation of defendant's Fifth Amendment right. Custodial interrogation can not be conducted by private persons and once a defendant makes a spontaneous statement, prior to being advised of his rights, a prosecutor may comment on appropriate information missing from the statement. People v. Martin (Cal.App.) 162 Cal.Rptr. 133.

CONFESSION - VIDEOTAPE

The court could admit a videotape of a defendant's confession in which he visited the murder scene and pointed out where certain objects had been located and described how the offense had been committed. Gates v. State (Ga.) 261 S.E.2d 349.

COUNSEL

The court did not abuse its discretion by denying the defendant's motion, made one day before trial, to replace his appointed counsel with retained counsel. United States v. Silva (5th Cir.) 611 F.2d 78.

DOUBLE JEOPARDY - GUILTY PLEA

Where the defendant entered into a plea agreement and pled guilty to second degree murder, he could be retried for first degree murder after he won an appeal that overturned his guilty plea. Commonwealth v. Newmiller (Pa.) 409 A.2d 834.

DWI - TRAFFIC OFFENSES

Where the defendant, who had been arrested for DWI and was being transported for chemical blood alcohol analysis, became unconscious the arresting officers could direct a doctor to take a blood sample from the unconscious suspect. State v. White (Minn.) 287 N.W.2d 416.

EVIDENCE

The court did not err by allowing the introduction of blood-stained clothes admittedly worn by the defendant on the day of the murder despite the fact that the state's expert was unable to determine the type of the blood or whether it was human. State v. Maniun (La.) 378 So.2d 931.

INSANITY

Placing the burden of proving insanity on the defendant does not violate fundamental fairness. State v. Ellingwood (Me.) 409 A.2d 641.

JUDGE

The fact that a judge, in his prior position as a prosecutor had prosecuted defendants in several unrelated cases did not require him to recuse himself from presiding over their jury trial. Jenkins v. Bordenkircher (6th Cir.) 611 F.2d 162.

LICENSE REVOCATION - TRAFFIC OFFENSES

Revoking the license of defendant for failure to take a breath-alyzer test was proper despite the fact that defendant blew into the machine a sufficient amount of air to make a green light go on. Defendant's refusal to give a deep lung sample could have resulted in a false reading favoring either the state or defendant and constituted a refusal to take the test. Powell v. Cox (Utah) 608 P.2d 239.

MOTION IN LIMINE - PUNISHMENT

The court did not abuse its discretion by granting the prosecution's motion in limine prohibiting the defense from mentioning the possible consequence of a verdict of guilty. Craig v. State (ind.) 398 N.E.2d 658.

PLEA BARGAIN

Where the government had probable cause to bring other charges against the defendant, it could use the threat of those charges to encourage him to accept a plea agreement. United States v. Gardiner (9th Cir.) 611 F.2d 770.

MIRANDA

Where the defendant's arrest had stemmed from an automobile accident (he was the subject of a detainer order from another state and a suspect in a muder case) and in the course of the questioning on the murder charge he asked to see an attorney regarding a civil suit arising out of the accident, his request to see the civil attorney did not require the police to cease questioning him on the murder charge. Stone v. State (Fla.) 378 So.2d 765.

The fact that a tape recorded statement made by the defendant did not include Miranda warnings was not conclusive evidence that the warnings were not given. Although the defendant testified that he was not informed of his rights, the investigating officers testified that they read the warnings to the defendants. State v. Williams (Neb.) 287 N.W.2d 18.

PREMEDITATION-MURDER - ACCOMPLICE

Defendant's "hit-list" was not unduly prejudicial and was properly admitted to show premeditation. People v. Adams (Cal.) 162 Cal.Rptr. 72.

SEARCH WARRANTS - SEARCH AND SEIZURE

Where officers were legitimately on the premises pursuant to a search warrant to seize heroin, they could also seize papers in plain view that indicated who owned premises in question. The documents in question had been observed prior to discovery of the heroin, and were subject to destruction if the police left to obtain another warrant. State v. Williams (N.C.) 263 S.E.2d 571.

TRIAL IN ABSENTIA

The defendant could be tried in absentia where he had been given permission to leave the jurisdiction and failed to appear on the date set for trial. United States v. Powell (4th Cir.) 611 F.2d 41.

WAIVER - MIRANDA

Miranda does not create a per se rule that a suspect may not be questioned after he has made a request for an attorney; rather, the suspect may subsequently waive his right to have an attorney present during questioning. White v. Finkbeiner (7th Cir.) 611 F.2d 186.

DEATH PENALTY - AGGRAVATING FACTORS

Various arguments against the death penalty are defeated here. Beating and gang-raping the victim, telling the victim they were going to kill her then rendering her unconscious and killing her constituted a cruel, heinous or depraved manner of killing. State v. (Luis) Mata (Ariz.) 609 P.2d 48.

FELONY-MURDER - DEATH PENALTY

Imposing the death penalty upon a defendant who had been convicted of felony-murder was proper where defendant had shot the victim five times without an accomplice's aid. State v. Arnett (Ariz.) 608 P.2d 778.

LESSER INCLUDED OFFENSE - INSTRUCTIONS

Where a greater offense (robbery) cannot be committed without committing the lesser offense (theft) and there is evidence to support a lesser included offense, a lesser included offense instruction should be given. Here the jury might have believed the clerk's story that defendant took money from the register, but rejected the clerk's story regarding use of force or fear. Failure to give the instruction was reversible error. State v. Dugan (Ariz.) 608 P.2d 771.

PRIOR CONVICTIONS

Although the better procedure is for the trial court to make a specific, on-the-record Rule 609 finding based on particular facts, failure to do so is not reversible error where the extended record reveals that the Rule 609 test was considered and applied. An offense that occurred in November, 1968, was not 10 years old when the trial took place in April, 1978 was properly admitted. State v. Ellerson (Ariz.) 609 P.2d 64.

SEVERENCE - BRUTON

Not granting a severance so that defendant could cross-examine his codefendant brother was proper since both of their confessions, which were admitted at trial, were consistent with each other and did not implicate the other codefendant more than the codefendant's confession implicated himself. State v. (Luis) Mata (Ariz.) 609 P.2d 48.

BURGLARY

Even though defendant entered a building he was going to burn down with a key given him by the manager for that purpose, the entry constituted burglary. The manager wanted the building burned to make it impossible for the owner to conduct a threatened audit, so the manager had no authority to consent to the entry. State v. Hartfield (Or.App.) 609 P.2d 390.

CHAIN OF CUSTODY

The State was not required to establish an unbroken chain of custody for a weapon in order to introduce it into evidence. State v. Pierce (Iowa) 287 N.W.2d 570.

DOUBLE JEOPARDY - PROSECUTORS

Where a mistrial is declared because the prosecutor might be called as a witness, the defendant's retrial is not barred by double jeopardy. State v. Jenich (Wis.) 288 N.W.2d 114.

DWI - TRAFFIC OFFENSES

The implied consent law applies to unconscious defendants and defendants who may be unable to give an intelligent consent to taking a blood-alcohol reading, because of the level of their blood-alcohol (.30% here). "To hold otherwise would permit the worst offender, the passed-out drunk, to escape the provision of the statute by his own voluntary act." State v. Garner (Kan.) 608 P.2d 1321.

HEARSAY - TRAFFIC OFFENSES

A "calibration card" showing the results of a calibration test performed on the speedometer of a police vehicle may properly be admitted as a business record in defendant's trial for speeding. People v. Stribel (Colo.) 609 P.2d 113.

IDENTIFICATION

Telling the victim that the police had a suspect, and to pick the one that robbed her from the lineup was not unusual or suggestive. Telling her afterwards that she had picked the police suspect could not be considered suggestive, since the statement was made after the lineup took place. State v. Ponds (Kan.) 608 P.2d 946.

INSTRUCTIONS

An instruction (verbatim in opinion) that the state did not have to produce the deadly weapon used in an armed robbery was not error. Harrison v. State (Nev.) 608 P.2d 1107.

INSTRUCTIONS - MISTAKE

Where the jury was adequately instructed on the element of intent, the court was not required to give an instruction on the defense of mistake. State v. Molin (Minn.) 288 N.W.2d 232.

INTENT

Although aggravated battery is a specific intent crime, defendant was properly convicted of aggravated battery where he fired several shots at one person, killing him, and one of the bullets also struck a five-year-old in the crowd, injuring the child. The intent to injure one victim transferred to the second victim. State v. Stringfield (Kan.App.) 608 P.2d 141.

PICTURES - PHOTOS

It is not necessary that the witness who verifies a photograph be present when the photograph is taken. Johnson v. State (Ind.) 399 N.E.2d 360.

PROBATION - REVOCATION

Defendant's contention that the state had to prove defendant was able to make restitution, before revoking his probation for failure to make restitution, is defeated in State v. Miyoshi (Idaho) 609 P.2d 155.

REPUTATION - PRIOR BAD ACTS

Where the defense sought to establish that the murder victim had a reputation for violence, the court did not err in limiting the evidence to the victim's general reputation and excluding any evidence of specific violent acts. Music v. State (Ga.) 262 S.E.2d 128.

RAPE

It is not necessary to corroborate the testimony of a child rape victim in order to support a conviction for the offense. State v. Cabral (R.I.) 410 A.2d 438.

SEARCH WARRANTS

The fact that the children involved hadn't seen, for two years, pictures of defendant engaging in sexual conduct didn't mean that the information used to get a search warrant for the pictures was stale. Among other things the pictures weren't illegal, they were of defendant and were kept by defendant, and defendant had continued his efforts to seduce the children during the intervening two years. State v. Kirkpatrick (Or. App.) 609 P.2d 433.

SERIOUS BODILY INJURY

Where the victim was struck with a fork and received a wound requiring sutures and a scratched eyeball, probably resulting in blurred vision, his injuries were "serious bodily injur[ies]" sufficient to support a conviction for aggravated assault. State v. Kiluk (N.H.) 410 A.2d 648.

VOLUNTARINESS OF STATEMENTS

Where the judge had conducted a suppression hearing regarding certain statements before the defendant's first trial, he was not required to conduct another hearing before the defendant's second trial. Commonwealth v. Richmond (Mass.) 399 N.E.2d 1069.

WITNESSES - CROSS-EXAMINATION

The court did not abuse its discretion by granting the prosecution motion in limine prohibiting the defense from cross-examining the complaining witness on his failure to appear at two prior court dates. The failure of the witness to appear was not relevant to his credibility and it did not affect any material issue in the case. Rogers v. State (Wis.) 287 N.W.2d 774.

WITNESSES - FIFTH AMENDMENT

Where a prosecution witness asserted her Fifth Amendment privilege, she was "unavailable" to testify and the transcript of her preliminary hearing testimony was admissible. State v. Holt (Mo.) 592 S.W.2d 759.

NATIONAL ASSOCIATION OF EXTRADITION OFFICIALS

Reply to

Robert A. Grunow
Immediate Past President,
N.A.E.O.
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7859

ATTORNEY GENERAL'S OFFICE
HELENA, MONTANA
JUL 1 81980
RECEIVED

M E M O R A N D U M

TO: Members of Executive Committee

FROM: Robert A. Grunow
Immediate Past President
N.A.E.O.

DATE: July 15, 1980

Enclosed please find a copy of correspondence which I recently received from Mike Abbell regarding the transfer of federal prisoners to state custody upon completion of their federal sentences.

U.S. Department of Justice

Washington, D.C. 20530

June 27, 1980

Mr. Robert A. Grunow
President, National Association
of Extradition Officials
450 James Robertson Parkway
Nashville, Tennessee 37219

Dear Bob:

At your recent meeting in San Antonio, one of the participants raised the question whether their was a procedure for the federal government to release federal prisoners upon completion of their sentences in the states which filed detainers against them. The answer is yes.

Section 4085 of Title 18, United States Code provides:

(a) Whenever any federal prisoners has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release, to be transferred to a penal or correctional institution within such State or District.

If more than one such request is presented in respect to any prisoner, the Attorney General shall determine which request should receive preference.

The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."

(b) This section shall not limit the authority of the Attorney General to transfer prisoners pursuant to other provisions of law.

As is readily apparent from this statute, all that the requesting state need do is to have its Governor or other executive authority formally request the Attorney General (U.S. Bureau of Prisons) to transfer the prisoner to that state prior to his release from federal custody. Such a request, of course, must be accompanied by a certified copy of the indictment, information or judgment of conviction upon which the request based. As long as the request is received sufficiently in advance of a federal prisoner's release to permit it to be processed by the Bureau of Prisons, the Bureau of Prisons will arrange for the transfer of the prisoner to a correctional institution within the state making the request several weeks prior to the prisoner's release from federal custody. It also should be noted that the expense of such a transfer will be borne by the federal government, not the requesting state.

Because of the ease of using this procedure and the savings involved for the states, I believe it would be desirable for you to inform the members of your association of the Section 4085 procedure.

If you, or any other member of your association, have any questions concerning the use of the Section 4085 procedure, you should contact Mr. Clair Cripe, General Counsel, Bureau of Prisons, at 202-724-3064.

Yours truly,

Mike Abbell

Michael Abbell, Director
Office of International Affairs
Criminal Division

The Polygraph Technique
PAST AND PRESENT

By JAMES K. MURPHY
Special Agent
Laboratory Division
Federal Bureau of Investigation
Washington, D.C.

History of the Polygraph

In the middle of the 19th century, Dr. Hans Gross, an Austrian known as the "Father of Criminalistics," defined "search for truth" as the basis and goal of all criminal investigations. He asserted that "a large part of the criminalist's work is nothing more than a battle against lies. He has to discover the truth and must fight the opposite. He meets the opposite at every step." [1]

The search for truth and attempts at uncovering falsehood have been a universal and almost constant endeavor dating back to ancient time. In their attempt to discover deception, primitive societies developed complex procedures founded on magic and mysticism. To open the doors to truth, divine creatures sent messages through fire, boiling water, and torture. In some instances, faith in these powerful mysticisms miraculously allowed the innocent to go unscathed while the guilty bore the mark of guilt.

Some of these rituals were based on sound physiological principles. Oriental people, for example, distinguished truth from lying by having all of the accused chew dry rice and then spit it out. While this was a simple task for the honest, those who were deceiving had difficulty in accomplishing this task and were then judged to be guilty and punished accordingly. This practice recognized that fear slows the digestive process, including salivation. Thus, the deceptive were unable to spit out the dry rice, while the innocent, having faith in the power of their deity to clear them of the unjust accusation, felt little fear in contrast to the guilty who knew they would be discovered. [2]

Throughout the centuries, man continued to experiment with more scientific methods in determining truth and detecting deception. In 1895, Cesare Lombroso, an Italian scientist, employed the first scientific instrument to detect deception. This instrument, the hydrosphygmograph, measured changes in pulse and blood pressure when suspects were questioned about their involvement in or knowledge of a specific offense.

In 1914, Vittorio Benussi successfully detected deception with a pneumograph, an instrument that graphically measures an examinee's inhalation and exhalation. Benussi thus demonstrated that changes in breathing patterns accompany deception.

Further research by William Marston in 1917 dealt with the sphygmomanometer, which was used to obtain periodic discontinuous blood pressure readings during the course of an examination. He also experimented with and helped to develop the pneumograph, which records breathing patterns, and the galvanometer, which registers changes in skin resistance.

In 1921, John A. Larson developed the polygraph, an instrument capable of continuously recording blood pressure, pulse, and respiration. Leonarde Keeler continued research and development of the polygraph, and in 1949, the "Keeler Polygraph" included components that recorded changes in blood pressure, pulse, and respiration, as well as the newly developed galvanic skin reflex.

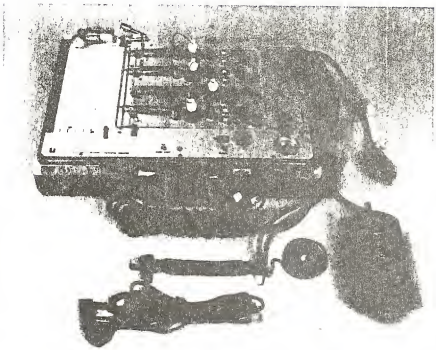
Research continued, culminating in what emerges today as a highly sophisticated, scientifically based technique.

Principles of the Polygraph

Everyone has at least a partial understanding of the psychology of lying and lie detection. Most of us are personally acquainted with the inner sensations that so often accompany telling a lie. In endeavoring to conceal the truth, one might feel a thudding increase of the heart beat, the rush of blood to the face, an uncontrollable impulse to swallow, or other symptoms resulting from fear over the possibility that the lie will be detected.[1]

These physiological changes—breathing, blood pressure, pulse rate and amplitude, and the galvanic skin reflex—are the phenomena with which the polygraph examiner concerns himself. The polygraph is a scientific, diagnostic instrument used to measure the physiological response of an examinee under controlled conditions.

The polygraph is based on the theory that when telling a lie, an examinee will respond physiologically because of fear of detection. Many investigators are under the misconception that a person responds on the polygraph out of a feeling of guilt for having committed the offense, or possibly for moral reasons because of upbringing or social background. This misunderstanding has led some to believe that hardened criminals, sociopaths, psychopathic liars, etc., can "beat" the polygraph because of their background or deviant personality. For whatever the reason, loss of job, reputation, or standing in the community, possible criminal conviction and jail time, personal humiliation, or simply a desire to keep the truth from the investigator who represents authority and the "system," it is fear of detection that causes the physiological changes the polygraph instrument records and the examiner interprets.



A typical modern four-channel polygraph instrument.

Practical Application

The actual polygraph examination consists of three phases: The pretest interview, the testing, and the post-test phase which, if warranted, consists of an interrogation.

However, prior to meeting the examinee, the examiner should confer with the investigator and obtain as many of the details of the offense as are available, as well as any other information pertaining to the examinee which might have a bearing on the case. For instance, is this person a suspect? If so, why? Does he have a prior record for this type of crime?

After thorough familiarization with the case, the examiner will be better able to converse with the examinee, as well as construct an appropriate series of questions for the actual examination. Having done this, the examiner is ready for the pretest interview.

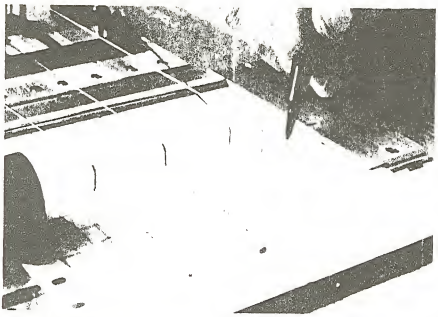
Pretest Interview Phase

This phase enables the examiner to introduce himself and explain the testing procedure and instrument, as well as establish a certain degree of rapport, obtain the examinee's version of the offense and/or alibi, and any other statement he desires to make. Whenever it is required, the examinee should be advised of his constitutional rights before any action is taken.

The questions to be used on this examination are also rehearsed with the examinee during this phase. When the pretest portion is completed, the actual testing begins.

The Testing Phase

Given a variety of threatening stimuli, a person will give greater psychological attention to that area which he perceives to hold the greatest threat to his well-being at that time. This is called psychological set; a properly constructed series of questions will offer this variety of stimuli.



Polygraph instrument tracings being recorded on chart paper during examination.

All questions are answered by only "yes" or "no." They have been rehearsed prior to the examination, and the examiner should be totally familiar with them. The series consists of relevant questions that cover knowledge, participation, and direct involvement in the offense under investigation, as well as irrelevant questions that are interspersed throughout the series. Questions such as whether he is wearing shoes, if his first name is John, or if he has been to the movies allow the examiner to establish a "normal" chart pattern in areas of known truth. Popular techniques used today include the use of control questions to which the examinee will probably lie. They deal with areas similar to the one under investigation; however, they are separated from the current matter by time and place. Reactions to these control questions are then compared to the reactions to the relevant questions. A well-trained polygraph examiner is then able to conclude whether deception is indicated.

If the results of the examination indicate that the examinee is telling the truth, he should be dismissed at that time with an expression of appreciation for his cooperation.

If the results indicate deception, the examiner should proceed to the final phase, unless there has been agreement to the contrary with the examinee's attorney.[4]

The Post-Test Interrogation

If the examiner has concluded that the examinee is lying, his objective is to explore and resolve the issue, seeking the truth. By definition, interrogation is a pointed, verbal solicitation of specific information. It must be done within the framework of our legal system. The examiner is legally bound to protect the rights of the individual, and by doing so, insure that the public interest is protected.

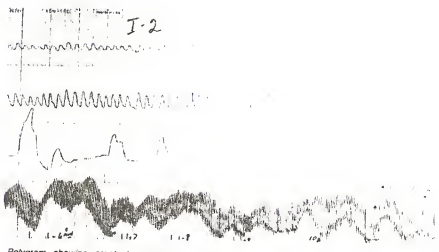
Effective use of interrogation tactics and techniques will usually overcome the examinee's inhibition that may be preventing a confession. The well-trained examiner/interrogator knows how to rationalize and minimize the seriousness of an offense, no matter how heinous. He is persuasive in his approach and makes a confession tolerable because of his understanding of human nature. His maturity and experience enable him to deal with all types of people from all levels of our society.

Validity and Reliability of the Polygraph

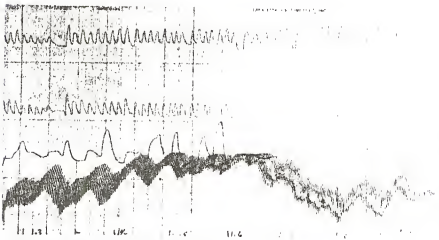
Use of the polygraph or any other scientific tool or technique in a forensic setting, wherein the rights of individuals are involved, should be based on the demonstrated validity and reliability of the technique. With respect to polygraph, the question is whether the polygraph examiner is consistently able to detect deception.

There are obvious problems in trying to conduct research to determine the validity and reliability of the polygraph. First, it is very difficult to simulate the psychophysiological reactions of a criminal suspect in a laboratory study or mock-crime situation. The same elements of fear and motivation that would be acting on suspects in an actual crime are just not present. Second, it is difficult to determine validity and reliability by studying polygraph results in actual criminal cases because the complete truth regarding the crime and its perpetrator(s) is generally unavailable and conclusions reached by polygraph examiners are normally not subject to full confirmation.

There have been a number of studies that give noteworthy recognition to the validity and reliability of the polygraph. One study published in 1978, which used polygraph examinations under laboratory conditions as well as on criminal suspects, concluded an accuracy rate in excess of 90 percent when the examinations were properly conducted and evaluated.[5]



Polygram showing greatest responses at the control questions in this particular test series, indicating that the subject of the examination is not deceptive to the relevant questions



Polygram for peak of tension test. Test pattern shows increasing anxiety as test proceeds toward question where subject reacts very significantly, indicating deception (question 6), and then relief during subsequent questions.

Other studies have concluded the polygraph to be 99 percent accurate, with an almost matching reliability rate.

It is generally believed that laboratory testing used in polygraph research tends to affect adversely the otherwise higher validity and reliability rates. Under laboratory conditions, it is difficult to simulate the stress that occurs under actual conditions.

Legal Status of the Polygraph

Federal Jurisdiction

The U.S. Supreme Court has denied *certiorari* on all cases where admissibility of polygraph results has been at issue. It has commented on the nature of polygraph results and noted it as one of the factors in deciding whether a confession or admission was voluntary.

District courts have admitted polygraph results in 9 of the 11 Federal circuits. The appellate courts have upheld State stipulations, wherein both the prosecutor and defense attorney agreed to admit the results of the examination prior to conducting it.

The general rule seems to be that admissibility is at the trial court's discretion; however, confessions resulting from polygraph examinations are almost universally accepted.

State and Local Jurisdictions

Decisions in the State courts indicate polygraph results have been admitted in 36 States, not admitted in 13 States, and no case of record in 1 State. Of the 36 States that have admitted results, 22 limited the admissions to stipulated results.

In 15 States, a trial court admitted polygraph results over the objection of opposing counsel without subsequent reversal. The Supreme Court for the States of New Mexico and Massachusetts have ruled similarly in favor of admitting polygraph results as evidence over the objection of opposing counsel.

There is a strong trend in State courts to follow the Arizona case of *State* v. *Valdez*[6] concerning stipulated admission of polygraph results. For cases of admissibility over objection of opposing counsel, New Mexico's 1975 case of *State* v. *Dorsey*[7] is often cited. Both of these cases have specific rules to be followed by the parties seeking admissibility.[8]

In a recent case, *People* v. *Daniels*,[9] the New York Supreme Court, Westchester County, stated that polygraph evidence should be treated like any other "if the evidence has substantial probative value and is relevant to the issue and does not endanger defendant's rights, or prejudice the jury, nor mislead the proper administration of justice, then it should be admitted as any other evidence."[10] The court pointed out that fingerprints, ballistics, and other kinds of scientific evidence are admitted under the same standard.

In reaching its decision, the court noted the many advancements in polygraph in recent years and that recent research had established the reliability and accuracy of the device at about 90 percent.

In discounting a number of objections to admissibility, the court stated that "the chance of beating the polygraph is no greater than outwitting the jury." [11] Further, the court pointed out that the case against the defendant rested upon his identification by a single eyewitness, the victim, and then declared that eyewitness testimony is "proverbially untrustworthy" [12] and less reliable that the polygraph.

The court laid down several standards to be observed in admitting polygraph evidence. Among other things, each side may choose a polygraph examiner whose competence and experience will be subject to scrutiny by the court. Also, the testimony of the examiner is to be considered "opinion evidence" and is not conclusive of guilt or innocence. The court also stated a threshold requirement—the defendant's knowing and voluntary agreement to be tested.

Conclusion

The polygraph technique, when properly used by competent, well-trained examiners, possesses a high degree of accuracy, adding a new dimension to an agency's enforcement capabilities. If readily available to its investigators, the uses of the polygraph are flexible and varied. Besides identifying guilt, it can eliminate suspects, verify witnesses' statements, corroborate informant information, and determine the veracity of a complainant's statement.

The polygraph, when used judiciously, can be instrumental in reducing costs and saving man-hours. It can also dramatically increase the conviction rate due to the high occurrence of confessions made by suspects who had been less than candid prior to the polygraph examinations. **FBI**

Footnotes

[1] Eugene B. Block, *Lie Detectors: Their History and Use* (New York: David McKay Company, Inc., 1977), p. 11.

[2] Stanley Abrams, *A Polygraph Handbook for Attorneys* (Lexington, Mass., Lexington Books, 1977), p. 11.

[3] John E. Reid and Fred E. Inbau, *Truth and Deception* (Baltimore: The Williams and Wilkins Company, 1977), p. 1.

[4] Reid and Inbau, p. 307.

[5] David C. Raskin, Ph.D., and Gordon H. Barland, Ph.D., John A. Podlesny, M.A., "Validity and Reliability of Detection of Deception," National Institute of Law Enforcement and Criminal Justice, LEAA, U.S. Department of Justice, 1978.

[6] *State v. Valdez*, 371 P. 2d 894 (Ariz. Sup. Ct. 1962).

[7] *State v. Dorsey*, 532 P. 2d 912 (N.M. Ct. App. 1975), remanded, 539 P. 2d 204 1975.

[8] Norman Ansley, *Polygraph Admissibility*, 3d ed., (Linthicum Heights, Md.: American Polygraph Assoc., 1979).

[9] The Criminal Law Reporter, Feb. 6, 1980, vol. 26, No. 18, Sec. 1, p. 1068.

[10] Id.

[11] Id. at 2386.

[12] Id.